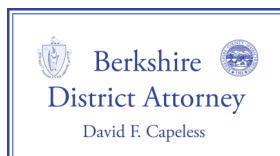


THE OPEN MEETING LAW

Massachusetts General Laws Chapter 39, Section 23B

Prepared by the Office of
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David F. Capeless
Berkshire District Attorney

The dual purpose of the Open Meeting Law is to foster openness and accountability in government while allowing certain limited governmental functions to be performed in private. The Law mandates that, with certain well defined exceptions, all governmental meetings and records are to be open and available for inspection by the public.

As District Attorney, I am vested with the authority to enforce the Open Meeting Law. To do so effectively, I have a responsibility to educate other public officials about their obligations under the Law. The purpose of this booklet is to summarize the requirements of the Law and the procedures that the Berkshire District Attorney's Office has adopted to handle complaints alleging violations of the Open Meeting Law.

Citizens of Berkshire County having questions about interpretation of the Law and its application to specific circumstances should contact their City Solicitor or Town Counsel. Citizens who believe that they have knowledge of a violation of the Open Meeting Law should report the matter to the District Attorney's Office in writing.

A handwritten signature in blue ink, appearing to read "David F. Capeless". The signature is fluid and cursive, with a long horizontal stroke at the end.

approval has been entered in the records of such body.

M. **Interference** —Obstruction; to come in collision or be in opposition; clash.

N. **Preponderance**—Superiority in weight, importance, or influence.

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INTRODUCTION

All meetings of a governmental body shall be open to the public and any person shall be permitted to attend any meeting except as otherwise provided by law.

A. A governmental body is defined as:

Every board, commission, committee, or subcommittee of any district, city, region, or town, however elected, appointed, or otherwise constituted, and the governing board of a local housing, redevelopment or similar authority; provided, however, that this definition shall not include a town meeting.

B. A governmental body cannot meet in a private session except as authorized by c. 39, § 23B.

C. No quorum of a governmental body shall meet in private for the purpose of deciding on or deliberating toward a decision on any matter except as authorized by c. 39, § 23B.

EXECUTIVE SESSION

A. Executive sessions are defined by the Law [G.L. c.39, § 23B] as any meeting of a governmental body which is closed to certain persons for deliberations on matters or issues.

B. Executive sessions shall not be held *until*:

1. The governmental body has first convened in open session for which notice has been given;

attempting to arrive at a decision on any public business within its jurisdiction.

E. **Reputation**—The character commonly imputed to one as distinguished from an individual's actual character; the community's judgment of a person .

F. **Character**—One of the attributes or features that make up and distinguish the individual; the combination of moral, religious, and intellectual beliefs that a person uses to direct his/her life.

G. **Professional Competence**—The requisite ability or qualities in a chosen field of endeavor.

H. **Meeting**—Any corporal convening and deliberation of a governmental body for which a quorum is required in order to make a decision at which any public business or public policy matter over which the governmental body has supervision, control, jurisdiction, or advisory power is discussed or considered, but shall not include any on-site inspection of any project or program.

I. **Complaint**—Formal allegation against a party.

J. **Detrimental Effect**—Accomplishment of injury or damage to a cause or individual.

K. **Emergency**—A sudden, generally unexpected occurrence or set of circumstances demanding immediate action.

L. **Made Public**—When the records of an executive session have been approved by the members of the respective governmental body attending such session for release to the public and notice of such

order a constable or any other person to remove him/her and confine him/her in some convenient place until the meeting is adjourned.

QUESTIONS AND ADVICE ABOUT THE OPEN MEETING LAW

It is advisable that city and town officials contact their city solicitors or town counsel to seek advice about the Open Meeting Law prior to contacting the District Attorney's Office.

DEFINITIONS

- A. **Governmental Body**—Every board, commission, committee, or sub-committee of any district, city, region, or town, however elected, appointed, or otherwise constituted, and the governing board of a local housing, redevelopment, or similar authority; provided, however, that this definition shall not include a town meeting.
- B. **Executive Sessions**—Any meeting of a governmental body which is closed to certain persons for deliberation on certain matters.
- C. **Quorum** —A simply majority of a governmental body unless otherwise defined by a constitution, charter, rule, or law applicable to such governing body.
- D. **Deliberation**—A verbal exchange between a quorum of members of a governmental body

- 2. A majority of the members have voted to go into executive session and the vote of each member is recorded on a roll call vote and entered into the minutes;
 - 3. The presiding officer has *cited* the purpose for an executive session; and,
 - 4. The presiding officer has stated before the executive session that the governmental body will reconvene after the executive session.
- C. Once an executive session has been convened, minutes of the executive session must be made and the minutes must accurately reflect what transpired during the executive session, including all votes taken.
- D. **Executive sessions shall be held only for the following purposes:**
- 1. *Personal Matters:*
To discuss the reputation (excluding professional reputation), character, physical condition (excluding the physical condition's impact on professional competence), or mental health (excluding the mental health's impact on professional competence) of an individual. The discussion of professional competence, at any time and in any manner, should be open to the public and not held in executive session. If there is any doubt as to whether professional competence has become an issue, then an executive session should not be convened. Consequently, every discussion that in any way related to a person's professional competence *must* be held in an open public session.*

2. *Personnel Matters:*

To consider the discipline or dismissal of, or hear complaints or charges brought against, a public officer, employee, staff member, or individual.*

3. To discuss strategy with respect to collective bargaining or litigation, if an open meeting may have a detrimental effect on the bargaining or litigating position of the governmental body; to conduct strategy sessions in preparation for negotiations with nonunion personnel; and, to *conduct* collective bargaining sessions or contract negotiations with nonunion personnel; collective bargaining sessions encompass not only negotiations leading to an agreement, but may also include the resolution of grievances pursuant to the collective bargaining agreement.
4. To discuss the deployment of security personnel or devices.
5. To investigate charges of criminal misconduct or to discuss the filing of criminal complaints.
6. To consider the purchase, exchange, lease, or value of real property, if such discussions may have a detrimental effect on the negotiating position of the governmental body and a person, firm, or corporation.
7. To comply with the provisions of any general or special law or federal grant-in-aid requirements.

maintenance of secrecy with respect to such records should be authorized. The remedy of a court order is not exclusive, but is in addition to every other available remedy.

- D. The rights of an individual relative to his/her appearance before a meeting in an executive or open session are in addition to the rights that an individual may have from any other source, including but not limited to rights under any laws or collective bargaining agreements. The exercise or nonexercise of one's individual rights under the Law shall not be construed as a waiver of any rights of the individual.
- E. The Superior Court may also award back pay.
- F. The Superior Court may also order civil fines up to \$1,000.00.

REGULATION OF PARTICIPATION BY THE PUBLIC [G. L. C. 39, § 23C]

Any person who asks to address a public meeting must have the permission of the presiding officer.

When the presiding officer requests silence, all persons shall be silent.

A presiding officer may warn a person who is disruptive at the meeting to desist.

If a disruptive person who is warned by the presiding officer persists in disorderly behavior, the presiding officer may order him/her to leave the meeting.

If the person does not leave, the presiding officer may

ENFORCEMENT

The District Attorney of the county in which a violation has occurred shall enforce the provisions of the Law.

Upon proof of a failure by any governmental body, or any member or officer thereof, to carry out any of the provisions of the Law for public notice or meetings, for holding open meetings, or for maintaining public records thereof, any justice of the Supreme Judicial Court or judge of the Superior Court sitting in the county in which the governmental body acts shall issue an appropriate order requiring such governmental body or officer to carry out the provisions of the Law at future meetings. A judicial order may be sought by the complaint of three or more registered voters, the attorney general, or the district attorney.

REMEDIES

- A. A court order may invalidate any action taken at any meeting at which any provision of the Law has been violated, provided that the complaint is filed within 21 days of the date when such action was made public. A judge presented with a complaint has the discretion to let the governmental body's action stand or to invalidate it.
- B. Upon proof of failure by any governmental body to carry out the provisions for public notice or meetings, or any other provision of the Law, the governmental body shall be ordered to comply with such provisions at future meetings.
- C. An order may, when appropriate, require the records of any such meeting to be made public, unless it has been determined by the court that the

- 8. To consider and interview applicants for employment by a preliminary screening committee or a subcommittee appointed by a governmental body; this does not apply to any meeting to consider and interview applicants who have passed a prior preliminary screening and are presented as finalists for the position.
- 9. To meet or confer with a mediator with respect to any litigation or decision on any public business within its jurisdiction.

*** Note: *Individual Rights at Executive Session*** – If an executive session is held for any of the reasons stated in 1. or 2. (above), the individual concerned has the following rights:

- i. The individual must be given 48 hours notice in writing before the executive session.

Such notice may be waived by the agreement of the individual and the governmental body.

- ii. The individual may request an open meeting, and the governmental body must honor the request, unless another statute specifically permits a closed session;
- iii. If an executive session is held, the individual has the right:
 - a. To be present during discussions or considerations that involve him/her;
 - b. To have counsel present;
 - c. To speak in his/her own behalf.

VOTING IN OPEN MEETINGS AND IN EXECUTIVE SESSIONS

No votes taken in open session shall be by secret ballot. All votes taken in executive sessions shall be recorded roll call votes and shall become part of the record of the executive session.

CHANCE MEETINGS

The Open Meeting Law shall not apply to any chance meeting or a social meeting at which matters relating to official business are discussed, so long as no final agreement is reached.

However, no chance meeting or social meeting shall be used to circumvent the spirit or requirements of the Law in order to discuss or act on a matter over which the governmental body has supervision, control, jurisdiction, or supervisory power.

Consequently, it is apparent that members of a governmental body can discuss matters related to official business as long as an agreement is not reached on an issue. If a quorum is present, discussions for the purpose of *deliberating towards a decision* are prohibited.

Any matter, therefore, properly before a governmental body should not be handled by a chance or social meeting.

Official minutes must be adopted within a reasonable time.

A governmental body must allow its minutes to be inspected or copied within 10 days of a request.

PUBLIC ACCESS

The public must be able to see and hear the deliberations.

The location of a meeting must be large enough to accommodate the public.

The votes cannot be by paper or secret ballot.

There can be no private discussions among a quorum during recess.

All meetings must be wheelchair accessible.

Sign language interpreters must be provided upon advanced notice.

Times and places should be convenient to the public and private homes should be avoided.

The public does not have the right to speak at a meeting.

MEMBERS TO BE GIVEN COPIES OF THE OPEN MEETING LAW

Upon qualification for office following an appointment or election to a governmental body as defined by the Law, each member shall be furnished by the city or town clerk with a copy of the Law. The member shall sign a written acknowledgement that he/she has been provided with such a copy.

MINUTES

- A. The minutes must be maintained in writing and should set forth the date, time, place, and members present at the meeting;
- B. They should include a summary of each discussion held;
- C. Each vote must be recorded exactly as it occurred.

EXECUTIVE SESSION MINUTES

The minutes must also set forth the date, time, place, members present or absent, action taken, and items considered at each executive session.

Every vote taken must be recorded by a roll call.

The records of any executive session may remain secret as long as their publication may defeat the lawful purposes of the executive session, but not longer.

Members of the governmental body must vote to approve the release of minutes of an executive session; however, the minutes become public records as soon as the reasons for secrecy are past, whether or not any action is taken by the governmental body.

RELEASE OF MINUTES

Open session minutes become public upon their creation, regardless of their form, and do not need to be approved for release.

Executive session minutes become public as soon as the reason for secrecy has passed or the governmental body has voted to approve the release.

ELECTRONIC MEETINGS

The Open Meeting Law applies to communications in *any* medium that reach a quorum, including telephone, e-mail, instant messaging, text messaging, posting to an on-line group, serial conversations, and online forums. However, the Law does not apply to communications which discuss “housekeeping” or “administrative” matters without having a “meeting.”

E-mail and telephone conferences that reach a quorum are contrary to the spirit of the Open Meeting Law.

NOTICE REQUIREMENTS

Except in an emergency, a notice of every meeting of any governmental body shall be filed with the Clerk of the city or town in which the body acts. An emergency is defined as a sudden, generally unexpected occurrence or set of circumstances demanding immediate action. What constitutes an emergency will be narrowly construed under the law, and the burden of proof will be upon the person declaring the emergency to prove it.

- A. Notice or a copy thereof shall be publicly posted at least 48 hours prior to such meeting (including Saturdays but not Sundays and legal holidays), in the office of such Clerk or on the principal official bulletin board of the city or town. The notice shall contain the date, time, and place of the meeting, but need not specify the agenda or subjects to be discussed at the meeting. The filing and posting of the notice shall be the responsibility of the officer calling the meeting.

- B. The secretary of a regional school district committee shall be considered to be its clerk, and:
- i. Shall file the notice of the meetings of the committee with the clerk of each city or town within such district and the clerk shall post the notice in his/her office or on the principal official bulletin board of the city or town; and
 - ii. Shall post such notice in his/her office or on the principal official bulletin board of the district.
- C. Notice requirements apply to adjourned or extended meetings.
- D. Content and Form of Notice:
- i. Notice shall contain the date, time, and place of the meeting and it shall be printed in easily readable type;
 - ii. A printed schedule of future meetings will suffice so long as the body in fact regularly meets at the scheduled time and place.

EMERGENCY MEETING

An emergency is the sudden, unexpected occurrence or set of circumstances demanding immediate action. The emergency must relate directly to the functions and responsibilities of the governmental body convening the meeting.

The governmental body calling such a meeting must still file and post notice, but notice can be less than 48

hours. The governmental body calling such a meeting should give as much notice as possible.

RECORDING THE MEETING

A governmental body shall maintain accurate records of its meetings setting forth the date, time, place, members present or absent, and action taken at each meeting, including executive sessions. A verbatim transcript is not required.

- A. The records of each meeting shall become public records and may be made available to the public; however, the records of any executive session remain secret as long as their publication may defeat the lawful purpose of the executive session, but not longer.
- B. A meeting of a governmental body may be recorded by *any* person in attendance by means of a tape recorder or any other means of sonic reproduction or by means of videotape equipment fixed in one or more designated locations determined by the governmental body except when a meeting is held in executive session; provided, that in such recording there is no active interference with the conduct of the meeting, and the meeting is not recorded secretly.
- C. Copies of the records of the meetings must be furnished upon the payment of a reasonable fee. [G.L. c. 66, § 10].